International Seabed Authority ISBA/24/C/12

Council

Distr.: General
25 May 2018

Original: English

Twenty-fourth session
Council session, part II
Kingston, 16–20 July 2018
Agenda item 19
Other matters

Considerations relating to a proposal by the Government of Poland for a possible joint-venture operation with the Enterprise

Report of the Secretary-General

I. Introduction

1. On 27 April 2018, the Secretary-General of the International Seabed Authority received an expression of interest from Mariusz Orion Jedrysek, Secretary of State for the Ministry of the Environment of the Government of Poland, to enter into negotiations to form a joint venture with the Enterprise.

2. The purpose of the present report is to provide the Council with the necessary background information on the relevant provisions of the United Nations Convention on the Law of the Sea and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 that pertain to the initial operations of the Enterprise, to identify some of the most important legal issues relating to the commencement of operations by the Enterprise and to inform the Council of the interest of the Government of Poland in the matter.

3. The submission of a full proposal for a joint-venture operation to the Council for its consideration in 2019 is envisaged. As required under the Agreement, any such proposal would have to be based on sound commercial principles. Should a proposal be approved in 2019, the Council may then decide to issue a directive for the independent functioning of the Enterprise, in accordance with section 2, paragraph 2, of the annex to the Agreement.

II. Legal status of the Enterprise

4. The present section contains a review of the relevant provisions of the Convention and the Agreement and provides an analysis of some of the issues associated with the implementation of those provisions.

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5. The Enterprise is established under article 170 of the Convention and annex IV thereto. It is the organ of the Authority responsible for carrying out activities in the Area directly, as well as the transporting, processing and marketing of minerals recovered from the Area. While the Enterprise is to act in accordance with the general policies of the Assembly and the directives of the Council, it is autonomous in the conduct of its operations, which are to be directed by a Governing Board composed of 15 members elected by the Assembly. The Enterprise is also to have a Director General, elected by the Assembly upon recommendation of the Council and the nomination of the Governing Board, who will be its chief executive and legal representative.

6. The provisions of the Convention relating to the Enterprise were significantly affected by section 2 of the annex to the Agreement, under which the functions of the Enterprise are to be performed by the secretariat of the Authority until such time as it begins to operate independently of the secretariat. Under the Agreement, a number of conditions were established that must be satisfied before the Enterprise may operate as an independent entity. Furthermore, the Agreement provides that the Enterprise is to conduct its initial deep seabed mining operations through joint ventures. Article 170 of the Convention and annex IV thereto are to be interpreted and applied in accordance with section 2 of the annex to the Agreement, which provides that, upon the approval of a plan of work for exploitation by an entity other than the Enterprise, or upon receipt by the Council of an application for a joint-venture operation with the Enterprise, the Council is to take up the issue of the functioning of the Enterprise independently of the secretariat of the Authority.

7. Two observations may be made in relation to those provisions. First, only the Council has the power to issue a directive for the independent functioning of the Enterprise. Such a directive may only be issued if joint-venture operations with the Enterprise accord with sound commercial principles. Only two potential trigger events require the Council to take up the issue, namely:

(a) The approval of a plan of work for exploitation (by any qualified entity and for any mineral resource, whether in a joint venture or not);

(b) An application for a joint-venture operation with the Enterprise.

8. In the latter case, there is no requirement that the joint venture involve a specific proposal to apply for a plan of work, nor is there any stipulation that the joint-venture proposal must include exploitation. A proposal to apply for a plan of work for exploration in a joint venture with the Enterprise is sufficient to trigger the clause. Theoretically, a proposal to commence any form of joint venture within the competence of the Enterprise as defined in annex IV to the Convention is also enough (for example, a proposal for a joint-venture marketing operation).[1]

[1] On the other hand, it is unclear whether an election to offer an equity interest in a future joint-venture arrangement with the Enterprise, which is available to applicants for plans of work for exploration for polymetallic sulphides and cobalt-rich ferromanganese crusts under regulations 16 and 19 of the applicable Regulations (ISBA/16/A/12/Rev.1 and ISBA/18/A/11, respectively), requires a decision by the Council relating to the operation of the Enterprise.

9. Upon either of the aforementioned events taking place, the Council is required to take up the issue of the independent functioning of the Enterprise. It is not required to come to a decision, but is to issue a directive providing for such independent functioning if joint-venture operations with the Enterprise accord with sound commercial principles. It is not clear whether this provision refers to joint-venture operations in general, or to a specific joint-venture proposal. [2] A reasonable interpretation may be that, where the trigger event is a proposal for a joint venture, the Council should consider whether that particular joint-venture proposal accords with sound commercial principles. If it does, then the Council is to issue an appropriate directive.

10. The second observation is that the Agreement contains no guidance as to the form and content of the directive to be issued by the Council. Presumably, however, such a directive would have to be made with reference to annex IV to the Convention and could refer to such matters as the timescale for the implementation of annex IV, the procedures for the election of the Governing Board and Director General and the initial funding of the Enterprise. One question that might arise is the extent to which the directive may be general in nature or must relate to the specific joint-venture proposal in question. In other words, does the Council approve a specific joint-venture proposal only, or does its directive simply "launch" the Enterprise into a formal existence, independent of the secretariat, whereupon the Governing Board would review the joint-venture proposal further and take an independent decision on the matter? While both interpretations are possible, it is suggested that the latter be preferred, on the basis that the Enterprise is intended to operate as an autonomous entity. This would also imply, in accordance with section 2, paragraph 4, of the annex to the Agreement, that any application for approval of a plan of work for exploration or exploitation by the Enterprise in a joint-venture operation needs to be made separately, in accordance with the applicable regulations.

III. Implications for the reserved area

11. The Council may note that a formal proposal for a joint venture with the Enterprise would have implications for future access to the reserved area blocks covered by the proposal, whether by the contractors having originally contributed the areas in question or by any other qualified entity.

12. In the case of the contractor having originally contributed the reserved areas in question, pursuant to section 2, paragraph 5, of the annex to the Agreement, [3] a contractor having contributed a particular area to the Authority as a reserved area has the right of first refusal to enter into a joint-venture arrangement with the Enterprise for exploration and exploitation of that area. This requirement would need to be taken into account in the context of a joint-venture proposal.

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[2] Edward Duncan Brown is of the opinion that the meaning of the provision is not altogether clear. He raised the question of whether it is open to the Council, following approval of a plan of work for exploitation for an entity other than the Enterprise, to make a general determination that "joint-venture operations with the Enterprise accord with sound commercial principles" or whether such a determination may be made only after receipt of an actual application for a specific joint-venture operation with the Enterprise. Edward Duncan Brown, *Sea-Bed Energy and Minerals: The International Legal Regime*, vol. 2, *Sea-Bed Mining* (The Hague, Kluwer Law International, 2001), p. 325.

[3] See also regulation 17 (4) of the regulations on prospecting and exploration for polymetallic nodules in the Area (ISBA/19/C/17), as well as regulation 18 (4) of the regulations on prospecting and exploration for polymetallic sulphides in the Area and the regulations on prospecting and exploration for cobalt-rich ferromanganese crusts in the Area (ISBA/16/A/12/Rev.1 and ISBA/18/A/11, respectively).

13. The situation is more complex with regard to applications by other qualified entities. Under article 9 of annex III to the Convention, the Enterprise is to be given an opportunity to decide whether it intends to carry out activities in each reserved area. At the same time, however, any State party which is a developing State or any natural or juridical person sponsored by it and effectively controlled by it or by any other developing State that is a qualified applicant may notify the Authority that it wishes to submit a plan of work with respect to a reserved area. Such a plan of work may be considered if the Enterprise decides that it does not intend to carry out activities in the reserved area in question.

14. The exploration regulations[4] establish procedures for the implementation of article 9 of annex III to the Convention and sets time limits for the Enterprise. They state that an application by a developing State for a reserved area may be submitted at any time after such an area becomes available following a decision by the Enterprise that it does not intend to carry out activities in that area or where the Enterprise has not, within six months of the notification by the Secretary-General, either taken a decision on whether it intends to carry out activities in that area or notified the Secretary-General in writing that it is engaged in discussions regarding a potential joint venture. In the latter instance, the Enterprise has one year from the date of such notification to decide whether to conduct activities in that area.

IV. Governance arrangements

15. Another important issue for the Council to consider, should it decide in due course to give its approval to a potential joint-venture operation, is the question of the governance arrangements that would apply during the period prior to the independent functioning of the Enterprise (the interim period).

16. In order to preserve the notional independence of the Enterprise and to avoid any potential conflict of interest for the Secretary-General, the Agreement provides that the functions of the secretariat with regard to the Enterprise are to be performed under the oversight of an interim Director General, who is to be appointed by the Secretary-General from within the staff. In practice, however, such independence is difficult to achieve, given the very small size and limited capacity of the secretariat. In particular, since the staff member so appointed reports and is accountable to the Secretary-General, there is potential for conflict of interest.[5]

17. Should a joint-venture proposal be submitted to the Council in 2019, and should the Council decide to proceed with the proposal, it may also wish at that time to consider an alternative model for the governance of the Enterprise during the interim period, in accordance with the Convention and the Agreement. Such an alternative model would need to allow for the provision of independent legal and financial advice to the Council through the interim Director General of the Enterprise, or his or her representative, taking into account considerations of transparency, cost-effectiveness and independence.

[4] See regulation 17 (2) in ISBA/19/C/17, as well as regulation 18 (2) in ISBA/16/A/12/Rev.1 and ISBA/18/A/11.

[5] The last such appointment expired in March 2013. In 2017, the Assembly decided, on the recommendation of the Committee established by the Assembly to carry out a periodic review of the international regime of the Area pursuant to article 154 of the United Nations Convention on the Law of the Sea, that it was not necessary at that time to make such an appointment.

V. Conclusion

18. It is emphasized that no specific joint-venture proposal is before the Council at the present time. The Council is nevertheless invited to take note of the interest of the Government of Poland in discussing the details of such a proposal with the secretariat, in its capacity of carrying out the interim functions of the Enterprise, and in submitting such proposal to the Council for consideration at the session in 2019. At that time, the Council would need to determine whether joint-venture operations with the Enterprise accord with sound commercial principles and, if so, issue a directive with regard to the independent functioning of the Enterprise, including interim governance arrangements.